
IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

77-1188

ELTRA CORPORATION,
Appellant

v.

BARBARA A. RINGER,
Appellee

APPELLEE'S BRIEF

FILED

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Of Counsel
Dorothy M. Schrader
Senior Attorney
United States Copyright Office
Library of Congress
Washington, D. C. 20559
(703) 557-0865

Jon A. Baumgarten
General Counsel
United States Copyright Office
Library of Congress
Washington, D. C. 20559
(703) 557-8731

James H. Simmonds
15th St. & North Courthouse Rd.
Arlington, Virginia 22201
(703) 525-7700

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BRIEF OF APPELLEE

ISSUES PRESENTED FOR REVIEW

1. Whether Appellant Eltra Corporation's typeface design is copyrightable subject matter.
2. Whether it is necessary for this court to decide any question relating to the authority of the Register of Copyrights; or, in the alternative, whether the Register of Copyrights properly refused registration of Appellant Eltra Corporation's typeface design.

STATEMENT OF THE CASE

Eltra Corporation ("Eltra") appeals from the October 26, 1976 order of the United States District Court for the Eastern District of Virginia, Alexandria Division (Bryan, J.), granting the motion of the defendant Register of Copyrights, director of the Copyright Office ("Register" or "Copyright Office") for summary judgment and denying Eltra's petition for an order compelling the Register to issue a certificate of copyright registration for its "ORION" typeface design.

On July 2, 1974, Eltra filed an application with the Copyright Office on Form "G", accompanied by two film font copies, and the statutory fee to register a claim to copyright as a work of art on the typeface design called "ORION." Opinion, App. 52.

By letter of December 19, 1975, the Chief of the Examining Division refused to register a claim to copyright in the typeface design called "ORION" on the ground that it was not the writing of an author within the meaning of the copyright law (17 U.S.C. 4) and that it was not a work of art within the meaning of 17 U.S.C. 5(g) and the applicable regulations of the Copyright Office. This action constituted the final action of the Copyright Office and exhausted Eltra's administrative remedies. SD-2, App. 96.

On April 7, 1976, Eltra brought this action in the nature of mandamus to compel registration of the "ORION" typeface design. Complaint, App. 1. The United States District Court for the Eastern District of Virginia had jurisdiction under 28 U.S.C. § 1338 (a).

Following cross-motions for summary judgment (App. 26 & 42) the District Court ruled that Eltra's "ORION" typeface design was not entitled to copyright registration, citing the repeated refusal of Congress to legislate copyright protection for typeface designs and actual congressional acquiescence in the long-standing administrative practice of the Copyright Office in denying copyright registration for typeface designs. Opinion, App. 59-61.

ARGUMENT

POINT I. ELTRA'S TYPEFACE IS NOT COPYRIGHTABLE SUBJECT MATTER

A. The Issue

The issue in this case is whether Eltra's typeface design ("ORION") is proper subject matter contemplated by the Copyright Act (17 U.S.C. § 1 et. seq.). The "attractiveness" or "pleasing nature" of typefaces in some broadly aesthetic or philosophic sense has no relevance to this case. Vacheron & Constantin Le-Coultré Watches, Inc. v. Benrus Watch Co., 155 F. Supp. 932, 934 (S.D.N.Y.), mod. on other grounds, 260 F. 2d 637 (2d Cir. 1958); see also, Bouve v. Twentieth Century-Fox Film Corp., 122 F. 2d 51, 53 (D.C. Cir. 1941); nor does the amount of time or money allegedly spent in their creation. L. Batlin and Son., Inc. v. Snyder, 536 F. 2d 486, 488 (2d Cir. 1976). More specifically, the issue is whether a typeface like "ORION" is a "work of art" as that term is used in 17 U.S.C. 5 (g).* Cf. Mazer v. Stein, 347 U.S. 201, 213 (1954) (the meaning of "art" for the purpose of the tariff laws "need not be appraised in relation to the copyright issue").

*Eltra has apparently abandoned its contention before the District Court that its typeface design is copyrightable as a "writing of an author" under section 4 of the Copyright Act, regardless of the section 5 categories. In any event, the argument is totally unsupported and untenable. Defendant's Brief In Support of Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgement, and in Opposition to Plaintiff's Motion for Summary Judgement, pp. 31-36. (Hereinafter "Defendant's Brief").

Although Eltra would determine this issue on the basis of a broad dictionary definition of "art", it is well established that in determining the meaning of a statutory term "there must be recourse to all the aids available in the process of construction, to history, analogy and practice as well as to the dictionary. Norwegian Nitrogen Products Co. v. U.S., 288 U.S. 294, 317 (1933) (emphasis added). See also, e.g., Mazer v. Stein, 347 U.S. at 213-214 ("legislative history" and "practice of the Copyright Office" as indicative of legislative intent regarding "works of art"). Indeed, in L. Batlin and Son, Inc. v. Snyder, 187 U.S.P.Q. 721, 725 n. 91, reversed en banc on other grounds, 536 F.2d 486 (2d. Cir. 1976), the Second Circuit repudiated the dictionary definition relied on by Eltra as a meaningful statutory standard, noting that "in order to properly understand the term ["work of art"] as it should be applied, we must analyze the purpose of the copyright legislation in the light of history."

The Copyright Office respectfully submits that "history, analogy and practice" -- i.e., a proper analysis of the Copyright Act, the legislative history of copyright and design acts and proposals, case law, and applicable Copyright Office Regulations and practices -- clearly show that typefaces are not, and were not intended to be, copyrightable subject matter under existing law. The District Court correctly observed that "the legislative history here

is very relevant and is not just inaction, but actual acquiescence in the administrative interpretation given the Copyright Act. That interpretation is long standing and is itself entitled to 'great weight' in determining the meaning of a statute. Stein v. Mazer, 204 F.2d 472, 477 (4th Cir. 1953). "[Opinion, App. at 60]. As discussed at POINT II of this brief, the District Court's dicta concerning "art" do not detract from this conclusion.

B. Statutory Analysis and Legislative History

1. Copyright Act of 1909

The current copyright law, enacted in 1909* does not define "work of art" [17 U.S.C. 5 (g)], the category of copyrightable subject matter under which Eltra seeks registration. The term must be given its "historical and ordinary" meaning. Bailie v. Fisher, 258 F.2d 425, 426 (D.C. Cir. 1958); Rosenthal v. Stein, 205 F.2d 633, 635 (9th Cir. 1953). Even without reference to legislative history, typeface designs are not within the "historical and ordinary" meaning of the term "works of art." See, e.g., Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co., 155 F. Supp. 932, 934 (S.D. N.Y.) ("We are used to calling [an engraved glass vase] objects of art. A wristwatch, however, is not within that class."), mod. on other grounds, 260 F. 2d 637 (2d Cir. 1958)

*The Act of March 4, 1909, ch. 320, 35 Stat. 1075, as amended.

The first Regulations issued by the Copyright Office under the 1909 Act specifically excluded registration of "ornamental letters or forms of type". Copyright Office Regs. (1910) at p. 9 (SD-8). Eltra notes that this exclusion was in connection with the classification of "prints and pictorial illustrations" and suggests that typeface designs may have been considered registrable under other classifications. The suggestion is controverted by the practices of the Office discussed below. If speculation as to the particular placement of the typeface prohibition in the 1910 Regulations is appropriate, it seems more plausible to assume that the framers of the Regulations did not consider typeface designs even to approach "the historical and ordinary conception of the term art" or the normal connotations of the other classifications so as to require their express exclusion from the "work of art" class or other categories.*

*The Copyright Office has been unable to determine the specific reason for omission of an express typeface prohibition in editions of the Office's regulations between 1914 and 1956. However, contemporaneous documents and events (discussed below) show that the Office continued to view typeface designs as not constituting subject matter of copyright. (Omission of the express typeface prohibition may have been related or attributable to the Office's anticipation of the passage of legislation with which it was involved -- discussed below -- specifically dealing with typeface protection.)

Eltra also relies on the explanation of the 1909 Copyright Act's change from "works of the fine arts" to "works of art" given by Librarian of Congress Herbert Putnam during the 1906 hearings. However, this explanation does not imply that typeface designs are copyrightable because they are not fine art. The Copyright Office agrees with Eltra that Librarian Putnam's views are most significant. The Librarian's view was, in fact, that typeface designs fell outside of the Copyright Act. This is demonstrated by the express exclusion of typeface designs in the 1910 regulations issued by Register of Copyrights Thorvald Solberg with the approval of Librarian Putnam. Both Register Solberg and Librarian Putnam were leading participants in the preparation of the bills culminating in the Act of 1909. See Goldman, The History of U.S.A. Copyright Revision From 1901 to 1954, Copyright Revision Study No. 1 at 1-4 (SD-78). It is also demonstrated by Register Solberg's participation, under Putnam's supervision, in proposed but unsuccessful legislation (discussed below) which would have expressly protected typefaces under copyright principles (see, e.g., Solberg, "The Present Copyright Situation," 2 Yale L.J. 184, 187 (1930)) Solberg personally drafted at least one such bill (namely, SD-59). See Hearings before the Committee on Patents of the House of Representatives on H.R. 6250 and H.R. 9137, 68th Cong., 1st Sess., (1924) at 282 (SD-79); Hearings before the Committee on Patents

of the House of Representatives on H.R. 10351, 68th Cong., 2d Sess., (1925) at 4, 38-39 (SD-80). The conclusion is inescapable that both Putnam and Solberg considered typeface designs outside the scope of the Copyright Act.

The courts have acknowledged that "substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of men who probably were active in the drafting of the statute [and as such] they are entitled to serious consideration" (White v. Winchester Country Club, 315 U.S. 32, 41 (1941)); that long-standing administrative practice "reflect[ing] a uniform contemporaneous interpretation of [an] Act by persons presumably familiar with its background and purpose" is persuasive evidence of legislative intent; (Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426, 432 (9th. Cir. 1967)); and, similarly that the understanding of a statute by those charged with its administration is particularly relevant to legislative intent when it involves "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933).

The contemporaneous view of typeface design as falling outside the ambit of the Copyright Act is not limited

to Solberg and Putnam. As will be shown below, it was the understanding of the typeface industry and of Congress as well.

Mazer v. Stein, 347 U.S. 201 (1954) does not support Eltra. The Court there concluded that an admittedly independently existing "work of art" -- a statuette of a Balinese dancer, registered in the form of a sculpture as such in the Copyright Office and marketed as both a statue and a lamp base -- did not lose copyright protection simply because it was intended to be embodied in a useful article rather than intended to be a work of the traditional fine arts. The Copyright Office fully supported this position in an amicus brief before the Court. (SD-33). The Court's own explanation of the question it faced and its conclusion is significant: "This case requires an answer, not as to a manufacturer's right to register a lamp base, but as to an artist's right to copyright a work of art intended to be reproduced for lamp bases" (347 U.S. at 204-05; emphasis added) and "we find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration" (347 U.S. at 218; emphasis added). So here, the Copyright Office contends that Eltra's typeface designs are not "articles eligible for copyright"; not that they are barred by mere reason of industrial application.

Nowhere in its opinion in Mazer did the Supreme Court even intimate that "more than the traditional fine arts" and "works of art" encompass all skillfully produced articles

of use. Indeed, the Court was well aware that the Copyright Office did not consider all such works copyrightable. See, e.g., SD-33 at 7, 12 n.8, 31-32. Significantly, the core of the Court's decision and the 4th Circuit decision it affirmed was consideration and approval of the practices of the Copyright Office. 347 U.S. at 213-14; 204 F.2d 472, 477 (1953).

In Esquire v. Ringer, 414 F.Supp. 939 (1976), appeal pending (C.A. D.C. 76-1732), relied on at pp. 10 and 25 of Eltra's brief, the District Court relied upon the practices of the Copyright Office, but concluded that "past interpretations of the existing regulations [by the Copyright Office itself]* which have allowed registration for household lamps and candlesticks give content to the Copyright regulations and create an interpretive precedent binding here." 414 F. Supp. at 941.

In any event, there is no reason to believe that the Supreme Court in Mazer or Judge Gesell in Esquire** ever considered

* Although not apparent from the opinion, the "interpretations" referred to by Judge Gesell clearly were those of the Copyright Office itself. Plaintiff in that action introduced certain registrations for lamps at oral argument, and relied on a registration of a candlestick in its brief. This is supported in the transcript of oral argument and papers on file.

** In its pending appeal in Esquire, the Copyright Office does not disagree with the portion of the opinion relied on by Eltra namely, that: "works of art are eligible for copyright even if intended for use in industry" and that a "work of art as an element in a manufactured article having a utilitarian purpose is not barred from registration." We disagree with the Court's application of this standard to the shape of the lighting fixtures involved in that case as such; and in this case we deny that typeface design is a "work of art". In any event, it is not necessary to argue that appeal here; Esquire did not involve the subject matter, the regulation, or the particular issues, practices and history now under discussion.

the question of typeface design, which has its own particular legislative history, administrative interpretation and effects on copyright policy.

2. Typeface/Design Legislation

Design patents have been issued for typeface designs since at least as early as the mid-1800's. See Cooper v. Robertson, 385 F.2d 852, 859 (D. Md. 1936), reversed, 46 F.2d 766 (4th Cir. 1941). However, the rigorous design patent standards of "novelty" and "invention" apparently made it difficult for the patentees to sustain the validity of the patents and win infringement actions. In view of these difficulties, typeface designers have long, but unsuccessfully, sought to secure protection under the lesser copyright standard of "originality" (i.e., independent creation; not requiring novelty or uniqueness).^{*} By this action, Eltra seeks to acquire what Congress has repeatedly refused to grant; Eltra asks this court to amend the Copyright Act, not to apply it.

^{*}E.g., Hearings before the Committee on Patents of the House of Representatives [on H.R. 138], 72d. Cong., 1st Sess., (1932) at 84-85 (Statement of Mr. Ewing, former Commissioner of Patents) (SD-47); Hearings Before the Committee on Patents of the House of Representatives on H.R. 6458 and H.R. 13618 (1916) at 63 (Statement of R. Nelson, President, American Type Founders Co. (SD-48)).

a. Before 1909

Typeface designs are not new forms of endeavor. The "piracy" of new typeface designs was a well-known problem in the early eighteen hundreds. See Lawson, Printing Types - An Introduction, (1971) at 116: Bruce, "Typefounding in the United States," in Report of the Commissioner of Patents for the Year 1850, Ex. Doc. No. 32, 31st Cong., 2d Sess., at 401-02 (SD-81). At least one unsuccessful attempt to amend the copyright laws to include protection for "maker[s] of type, punches, cuts [or] type ornaments" by deposit of an impression of the "cut, type, punch or alphabet of punches [or] type ornament" was made as early as 1860. H.R. 803, 36th Cong., 1st Sess. (SD-46).

As typeface design and piracy were all recognized before 1909, the contemporaneous views of typeface as outside the scope of the 1909 copyright law --i.e., the current Copyright Act -- are significant.

The history of copyright law has been one of gradual expansion in the types of works accorded protection, and the subject matter affected by this expansion has fallen into two general categories. In the first scientific discoveries and technological developments have made possible new forms of creative expression that never existed before. In some of these cases the new expressive forms--electronic music, filmstrips, and computer programs, for example--could be regarded as an extension of copyrightable subject matter Congress had already intended to protect, and were thus considered copyrightable from the outset without the need of new legislation. In other cases, such as photographs, sound recordings, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable works....

The historic expansion of copyright has also applied to forms of expression which, although in existence for generations or centuries, have only gradually come to be recognized as creative and worthy of protection. The first copyright statute in this country, enacted in 1790, designated only "maps, charts, and books"; major forms of expression such as music, drama, and works of art achieved specific statutory recognition only in later enactments. [H.R. Rep. 94-1476, 94th. Cong., 2d Sess. at 51-52 (SD-85)].

Similarly, in Goldstein v. California, 412 U.S. 546, 562 (1973) the Supreme Court noted that "... whether any specific category of 'writings' is to be brought within the purview of the federal statutory scheme [of copyright] is left to the discretion of Congress."* That is essentially the point; the extension of copyright to typefaces is "for the discretion of Congress".

b. After 1909

That typeface designs are not copyrightable subject matter is evident from the terms of the Copyright Act of 1909, the intent of Congress, and the contemporaneous construction of the Act by those charged with responsibility for its administration. This contemporary understanding of the Act is confirmed by strenuous efforts, which began only 5 years after enactment of the current copyright law, to persuade Congress to grant protection on copyright principles to typeface designs.

In 1914 the first of a series of bills were introduced in Congress which would have expressly protected "typefaces", among other designs, under the copyright standard of "originality" rather

*The footnote at that page of the Supreme Court's opinion examines the Congressional extension of copyright to various subjects.

than the more stringent "novelty" and "invention" requirements of the design patent law. H.R. 11321, 63rd. Cong., 2d. Sess. (1914) §25, class 7 (SD-49); S. 3950, 63rd. Cong., 2d Sess. (1914) § 25, class 7 (SD-50); H.R. 18223, 63rd. Cong., 2d. Sess. (1914) § 23, class 7 (SD-51). Similar measures expressly according protection to original "typefaces" were introduced in subsequent Congresses:

- H.R. 6458, 64th. Cong., 1st Sess. (1915) § 23, class 7 (SD-52)
- H.R. 14666, 64th. Cong., 1st Sess. (1916) § 23, class 7 (SD-53)
- H.R. 17290, 64th. Cong., 1st Sess. (1916) § 23, class 7 (SD-54)
- S. 6925, 64th. Cong., 1st Sess. (1916) § 23, class 7 (SD-55)
- H.R. 20842, 64th. Cong., 2d Sess. (1917) § 23, class 7 (SD-56)
- H.R. 10028, 65th. Cong., 2d Sess. (1918) § 23, class 7 (SD-57)
- S. 2601, 68th. Cong., 1st. Sess. (1924) § 6, class 7 (SD-58)
- H.R. 7539, 68th. Cong., 1st Sess. (1924) §6, class 7 (SD-59)

In H.R. 12306, 68th Cong., 2d Sess., (1925) (SD-60), the earlier versions of the design bills were condensed and the prior classification of works, including the specific enumeration of "typefaces" was omitted. See also, H.R. 10351, 68th Cong., 2d Sess. (1924); Hearings before the Committee on Patents, House of Representatives [on H.R. 10351], 68th. Cong., 2d Sess., (1925) at 4 (SD-80). Contrary to Eltra's assertion at p.19 of its brief, however, this is not significant. The Committee reporting the bill specifically expressed its intent to cover typefaces in an amended definition of protected designs. H.R. Rep. No. 1521, 68th. Cong., 2d Sess., (1925) at 2 (SD-61). The introduction of bills to provide protection for designs under the copyright principle of originality continued, after the above bills failed of passage,

from the 69th Congress to the current day. See Exhibit A of Defendant's Brief before the District Court. Many of these bills continued to avoid a detailed classification of protected works, but defined "design" in terms similar to the amendment of H.R. 12306, or contained definitions otherwise compatible with typeface protection. See, e.g., H.R. 138, 72d Cong., 1st Sess., (1931) § 1(b) (SD-62) and its support in terms of typeface protection on copyright principles in Hearings before the Committee on Patents of the House of Representatives, [on H.R. 138] 72d Cong., 1st Sess., (1932) at 84 (SD-47).

The District Court examined the history of this effort, noting that "[r]epeated proposals before Congress to afford protection to original typeface designs from 1914 to 1924 [SD-52 through SD-59] have not passed. Similar efforts have continued, unsuccessfully, to date, including the recent revision of the copyright laws. . . . In the hearings and reports on all such proposals it has been assumed by the proponents of the enactments, as well as by members of Congress, that typeface designs were not copyrightable (e.g., SD-85 at p. 50, 55)." (Opinion, App. at 60).

Eltra's attempt to divorce these legislative proposals from copyright is unavailing.* The bills introduced in the 63rd

* Similarly, its characterization of the bills as "Patent Office" or "Copyright Office" bills is meaningless. It is also inaccurate. The Patent Office certainly did not sponsor the early bills; they emanated from the efforts of Ernest Bradford, Counsel to both American Type Foundry Co., and the National Design Registration League. Commissioner Ewing gave only limited support to the first bill, (see, Hearings before the Committee on Patents, House of Representatives [on H.R. 11321], 63rd Cong., 2d Sess. (1914) at 47). The bills were not based on patent principles.

Congress would have accorded "exclusive rights" to "original" typeface designs by registration in the Patent Office -- that is, they were predicated on a registration system in the Patent Office under the copyright standard of originality. See, e.g., H.R. 11321, 63rd Cong., 2d Sess. (1914) (SD-49). Those introduced in the 64th Congress expressly considered the rights as "copyright" although maintaining the Patent Office as the Office of record.* In the bills of the 68th Congress, the registrations would have been moved to the Copyright Office itself. Succeeding bills also provided for administration in the Copyright Office, or were silent about the administrator.

In any case, the terms of the bills and the statements of the proponents at the hearings leave no doubt whatsoever that copyright protection was sought for the designs covered by the bills. Indeed, the proposed bills would have offered a lesser duration of protection than that obtainable under the Copyright Act. If typeface designs were already protected by copyright, for what reason would their designers seek a lesser term?

Contrary to Eltra's assertion that the Copyright Office relies on only the "isolated" statements of "one witness" regarding the early typeface proposals, the legislative history of the 1914-1918 bills, those most nearly contemporaneous with

* The provision for registration in the Patent Office under copyright principles had precedent in the then-existing system for copyright in commercial prints and labels. These were registered in the Patent Office until 1940. See Derenberg, "Commercial Prints and Labels: A Hybrid in Copyright Law," 49 YALE L.J. 1212, 1214-15 (1940).

the passage of the 1909 Copyright Act, are replete with references to the absence of copyright protection for typeface designs, coupled with argument to Congress that new legislation must be passed to protect typeface designs on copyright principles. For example, in 1914 Ernest W. Bradford, author of the first design bill and counsel for the American Type Founders Company responded to the contention that the existing design patent law protected typeface designs, by stating: "I submit that Mr. Whitman's letter, instead of discrediting the statements made by Mr. Nelson, serves to bring to the attention of the committee the records in the matter of contested cases that clearly substantiate everything that Mr. Nelson said on this subject and to make very clear the necessity of a simple copyright protection for this class of property [i.e. typeface designs], the same as is now accorded to other intellectual creations." Hearings [on H.R. 11321] before the Committee on Patents of the House of Representatives, 63rd. Cong., 2d. Sess. (1914) at 214; see also, Id. at 117-124 (Statement of Robert Nelson, American Type Founders Co.) and 127-29 (Statement of Frederick W. Goudy, typeface designer) (SD-63).

In 1916 Mr. R.W. Nelson, President of the American Type Founders Co., supported the bill for registration of original typeface designs:

" . . . because it gives to us a protection for our industry which we do not have under the copyright or under the patent law. There is a section of the patent law supposed

to give protection, but we have never been able to win a case." Hearings before the Committee on Patents of the House of Representatives on H.R. 6458 and H.R. 13618 (1916) at 61 (SD-48). (Mr. Nelson then went on to discuss the problems of typeface piracy faced by his company, in terms remarkably similar to the piracy arguments made by Eltra below. See Defendant's Brief before the District Court at 16-17.)

At the 1917 hearings, Senator Colt argued that the proposal to protect typefaces on the copyright principle of authorship rather than the design patent standard of invention was "extending the field of monopolistic protection way beyond anything ever contemplated under the Constitution of the United States. . . . I have a conviction that we may be going too far in this bill." Hearings before a Subcommittee of the Committee on Patents, United States Senate [on S. 6925], 64th Congress, 2d Session (1917) at 35 (quotation) and 36; see also, Id. at 47-57 (SD-64). The full scale debate between proponents and opponents of copyright protection for typeface designs in 1917 was repeated sixty years later. Compare SD-64 with SD-84.)

The vocal part played by Robert Nelson and his American Type Foundry Company is not surprising. It was then the dominant force in the typeface design industry. American Typeface's counsel, Ernest Bradford, was the principal author of the first of these bills (see Hearings on H.R. 11321, (SD-63), supra at 51) and a leading force behind those introduced through 1924. Bradford's interest in design legislation stemmed directly from the piracy problems of his type foundry client, and he characterized his employer, Robert Nelson, as the "instigator of the movement"

to protect designs on copyright principles. [Hearings on H.R. 6458 and H.R. 13618 (SD-48), supra, at 215]*

In sum, Eltra's contention that Congress was unaware of the absence of copyright protection for typeface designs must be dismissed as preposterous. **

Indeed a close examination of the hearings in 1914, 1916, and 1917 demonstrates that the attempt to obtain copyright protection for typeface designs was at the forefront of the unsuccessful design legislation effort.

3. Copyright Act of 1976

On February 17, 1976 the Senate passed S. 22 (SD-82), an Act for General Revision of the Copyright Law. Title II of the Senate Act, a successor to the design bills introduced in Congress since 1914, provided protection for original ornamental designs of useful articles under certain terms (such as a shortened duration of protection and more limited scope of exclusive rights) more restrictive than those of Title I, the

* See Hearings on H.R. 6458 and H.R. 13618 (SD-48), supra at 215-216 and 233 for Mr. Bradford's revealing statement on the beginnings of the design protection movement in 1912 and the integral role played by typeface copyright proponents. American Type Foundry, by its own assertion, designed more original typefaces than the rest of the world together. Hearings on H.R. 11321, (SD-63), supra, at 117.

** For a full appreciation of the extent to which Congress was informed of both sides of the typeface question, see generally: Hearings on H.R. 11321 (1914) supra, at 91-94, 105-106, 116-123, 127-129, and 212-214 (SD-63); Hearings on H.R. 6458 and H.R. 13618 (1916) supra, at 11-15, 61-66, 90-91, 215-216, 227, 242, and 276 (SD-48); Hearings on S. 6925, (1917), supra, at 10-16, 28-31, 35-36, 47-58, and 67-74 (SD-64). See also, Hearings before the Committee on Patents of the House of Representatives [on H.R. 138], 72d. Cong., 1st Sess. (1932) (SD-47).

"ordinary" copyright provisions. Earlier, on June 6, 1975, the Register of Copyrights urged the Chairman of the House Subcommittee considering the revision bill to hold hearings on the question of typeface protection under Title I or Title II of the House bill.SD-22.

On July 17, 1975 the House Subcommittee held such hearings, taking testimony from both proponents and opponents of copyright protection for typeface designs. "Copyright Law Revision", Hearings on H.R. 2223 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 94th Cong., 1st Sess. (1975), Part 2 at 991-1238 (SD-83). Eltra, through its Mergenthaler Linotype division, participated in these hearings, accompanying its testimony with the same printed arguments appended as Exhibit C to the Affidavit of Michael Parker on its motion below. SD-83 at 1028-1142.

On November 6, 1975, the Register of Copyrights testified before the Subcommittee on this issue, and supported the protection of typeface designs under Title II with certain amendments designed to accommodate the opposing interests. "Copyright Law Revision", Hearings . . . , Part 3 at 1860-1863. (SD-84). During her testimony, the Chairman of the Subcommittee agreed that typeface protection appeared better dealt with under the more limited provisions of Title II than the broad traditional copyright protection of Title I. SD-84 at p. 1862 (Remarks of Mr. Kastenmeier).

Although the technology of typography has undoubtedly undergone changes, many of the arguments urged by both sides on the issue had earlier been heard by Congress; the similarities between the arguments in the recent Hearings (SD-84) and the debate over typeface protection before Congress in (1917) (SD-64), for example, are most marked. As before, Congress -- for now -- declined to act on the request for protection of original typefaces. Thus, when the House Committee on the Judiciary reported out its revision bill, it deleted Title II in its entirety, stating that it:

" left unanswered at least two fundamental issues which will require further study by the Congress. These are: first, what agency should administer this new design protection system and, second, should typeface designs be given the protection of the title [These issues] have not been resolved by the deletion [of Title II] from the Copyright Revision Bill. Therefore, the Committee believes that it will be necessary to reconsider the question of design protection in new legislation during the first session of the 95th Congress." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., (1976) at 50 (SD-85), as corrected by an "errata sheet" published in the Federal Register of September 22, 1976 (SD-86).

Additionally, the Committee Report stated:

The Committee has considered, but chosen to defer, the possibility of protecting the design of typefaces. A "typeface" can be defined as a set of letters, numbers, or other symbolic characters, whose forms are related by repeating design elements consistently applied in a notational system and are intended to be embodied in articles whose intrinsic utilitarian function is for use in composing text or other cognizable combinations of characters. The Committee does not regard the design of typeface, as thus defined, to be a copyrightable "pictorial,

graphic, or sculptural work"* within the meaning of this bill and the application of the dividing line in section 101. SD-85 at p. 55.

The House bill, with Title II deleted, passed its chamber on September 23, 1976. At the Committee on Conference of the two houses the deletion of Title II was accepted by the Senate Managers. H.R. Rep. No. 94-1733, 94th Cong., 2d Sess., (Conference Report to Accompany S. 22) (1976) at 82 (SD-87). The bill was signed into law by the President on October 19, 1976 as Pub. L. 94-553 (90 Stat. 2541).

The 1976 Copyright Act evolved from a detailed and careful legislative consideration of a wide range of difficult issues, including the question of copyright protection for typeface designs. Congress has acted. The courts should not now give Eltra the protection for typeface designs that Congress has repeatedly seen fit to deny from 1909 to 1976.

Eltra's suggestion that the legislative history of the 1976 Copyright Act has no bearing on the protection of its typeface design is unsupportable. The arguments for and against copyright protection for typeface designs were fully heard, and Congress responded by deferring the possibility of such protection. This was not, nor was it considered by Congress, a change in the existing law. It was merely a reiteration of Congress' intent since 1909. It is not precluded in any way by the decisions rendered under the present copyright law and

* The term "pictorial, graphic or sculptural works" replaces the phrase "work of art" in the bill.

is most probative of the scope of the current law. Goodis v. United Artists Television, Inc., 425 F. 2d 397, 403 (2d Cir. 1970); Williams & Wilkins Co. v. United States, 487 F. 2d 1345, 1361 (Ct. Cl. 1973) affd. by an equally divided court, 420 U.S. 376 (1975); Rohauer v. Killiam Shows Inc., et. al, 192 USPQ 545 (2d Cir. 1977).

C. Congressional Acquiescence

It is clear that Eltra is seeking precisely what Congress has refused to grant to date; however, the courts have "decline[d] to repudiate an administrative interpretation of [an] Act which Congress refused to repudiate after being repeatedly urged to do so". Alstate Construction Co. v. Durkin, 345 U.S. 13, 17 (1953); see also U.S. v. Bugh, 352 U.S. 40, 46 (1956). (In considering the validity of an opinion of the Attorney General "it is of importance to note that several efforts were made to repeal this interpretation by a specific Act of Congress, but in each instance the bill failed to pass.") This is all the more true where Congress has indicated a desire to consider the matter further.

The District Court correctly concluded that "the legislative history here is very relevant and is not just inaction, but actual acquiescence in the administrative interpretation given the Copyright Act." (Opinion, App. 60). A holding to the contrary in this case would have been an improper addition of a "supplementary legislative provision" to the statute. Helvering v. Credit Alliance Corp., 316 U.S. 107, 113 (1942).

The evidence of actual congressional acquiescence in denying copyright to typeface designs is overwhelming. Resort to materials in legislative history is an appropriate means to ascertain the intention of Congress. E.g. United States v. Zachs, 375 U.S. 59 (1963); Flora v. United States, 362 U.S. 145 (1960), on rehearing, 357 U.S. 63 (1958).

The cases relied upon by Eltra do not support its position. In U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968), the Supreme Court rejected the argument that two unsuccessful attempts by the FCC to obtain legislation clarifying its authority to regulate cable systems indicated congressional intent that the FCC did not have such authority. In the case of typefaces, the legislation was not sought to clarify the authority of the Copyright Office or the content of the statute; legislation was sought to establish protection where, clearly, none existed, and where Congress had repeatedly failed to act. Rainwater v. U.S., 356 U.S. 590 (1957) involved an argument that a 1918 amendment of the criminal provisions of the False Claims Act demonstrated a congressional intent not to impose the stricture of civil provisions on certain corporations, even though the clear language of the False Claims Act required a different result. The argument by analogy failed in the face of unambiguous statutory language. Here, the Copyright Office does not argue by analogy; the legislative history of the bills referred to shows a contemporaneous, specific, and explicit understanding that typefaces are not subject to copyright. The expression of congressional

intent in denying copyright to typefaces under the 1976 Copyright Act is equally direct and unmistakable. Additionally the courts have acknowledged (pp. 4-5, above) that the statutory phrase "work of art" does require interpretation through history and practice.

While the Court in Haynes v. United States, 390 U.S. 85 (1968) stated in a footnote that the "views of a subsequent Congress of course provide no controlling basis from which to infer the purposes of an earlier Congress," the Court nevertheless proceeded to examine the views of a subsequent Congress. Also, here we are not dealing with the mere "views of a subsequent Congress", but with a long and repeated Congressional history, tracing back to and including the understandings and experience of officials and industry representatives close upon enactment of the 1909 law. Similarly, in United States v. Price, 361 U.S. 304 (1960), the Court in fact examined the legislative history of the Internal Revenue Code of 1939 as amended and merely found there was no support for the particular argument. ("We are similarly unable to find support for respondent's position in the history of the 1954 Code. . . . the reports contain no clear statement as to Congress' view of the then existing law." [361 U.S. at 312]). The "inferences from legislative history" were slight. 361 U.S. at 313

We have no need to infer Congress' intention regarding typeface designs. Congress has said: we have "considered, but chosen to defer, the possibility of protecting the design of typefaces",

[under the copyright law and under design legislation] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) at 55 (SD-85). Duncan v. Railroad Retirement Board, 375 F. 2d 915 (4th Cir. 1967) acknowledges the settled rule that "longstanding administrative interpretation of a statute, one acquiesced in by all interested parties, may form the basis for an inference that the administrative interpretation is correct." (375 F. 2d at 919). Moreover, there is indeed a "solid foundation" (Id.) for the ascertainment of congressional intent to deny copyright to typefaces and "conscious" congressional ratification (Id.) of the administrative practice.

D. Administrative Practice

The District Court properly concluded that the practice of the Copyright Office in refusing registration of typeface designs "is long-standing and is itself entitled to 'great weight' in determining the meaning of a statute" [Opinion, App. 61 (emphasis in original)], citing the Court's opinion in Stein v. Mazer, 204 F. 2d 472, 477 (4th Cir., 1953):

When an agency of the United States is empowered by a federal statute to issue regulations under, and also to administer and apply, that statute, and when the agency over a course of years applies that statute in a certain way, that application should be given great weight when a court is called upon to determine the meaning of the statute.

As also noted by the District Court, in its opinion affirming this court's decision the Supreme Court similarly relied on the Office's practices. Mazer v. Stein 347 U.S. 201, 213-14 (1954). The principle that the long-standing interpretation of the Copyright Act by the agency charged with its administration is entitled to great weight is well established. E.g., Goldstein v. California, 412 U.S. 546, 567 (1973); Udall v. Tallman, 380 U.S.1 (1965).

In our brief and accompanying stipulated documents below, the Copyright Office submitted the full available record pertaining to various attempts to register typeface designs.* The relevant actions taken by the Copyright Office with respect to these applications are thoroughly reviewed at pp. 8-11 of our main brief before the District Court. In brief:

On March 7, 1930 the Copyright Office rejected an application for registration of a "book" entitled "Bernhard Gothic Heavy", the deposit copies for which showed samples of a typeface and a complete font of type stating:

"The two copies filed are pages showing samples of the type face named, which of course involves the presence of a few words of text, as well as a table of characters in the complete font of type. It is our understanding, however, that copyright is not based on the text matter as such, but that what would be claimed by this registration would be the right to prevent the copying by anyone of the face of the type covered by the registra-

* Although Eltra alleges that certain of these stipulated documents did not deal with typeface designs (Appellant's Brief, p. 17 n. 9), they were made available to the District Court in order to provide as complete a record as possible. See Defendant's Brief before the District Court p. 8, fn.

tion. (§) The Copyright Office has never believed that it has been authorized under either present or prior law to make registration of a type face. Applications for registration of such matter have been from time to time received, but it is not believed that any registrations have been made. An application for original copyrightable matter printed in this style of type would of course be acted on without regard to any question of protecting the style of type; but unless we misunderstand the present case, it is squarely based on the theory that the typographic style is itself the subject of protection. (§) Registration does not appear permissible." (SD-65; App. 202)

On July 30, 1930 the Copyright Office rejected an application for a "book" entitled "Bernhard Gothic Medium Italic", the deposit copies for which comprised a font of type stating:

"There is nothing in the nature of a literary composition in the copies, and it is understood that the application is intended to cover the artistic design of the letters printed. (§) Protection for new designs of type is not believed to be provided for in the Copyright Act, hence the requested registration does not appear permissible." (SD-68; App. 219)

In 1937, the Office rejected an application for registration of a typeface design entitled "Legend" submitted by Sidney Struble, Esq., on behalf of Bauer Type Foundry. This rejection is significant in that the application sought registration of the design as a "work of art" and was accompanied by a fourteen-page memorandum supporting the application on arguments in many respects similar to those now made by Plaintiff. In response, Register Bouve fully explored the matter and stated the Office's view that the type design, as such, did not under any authority constitute the "writing of an author" or a "work of art" and that the Office must refuse registration "on the ground that it

is not copyrightable as such. This quite aside from the fact . . . that it is the Patent Office which is vested with jurisdiction to protect designs for a font of type". (SD-70; App. 238).

In 1939 the Office considered an inquiry by Lucien Bernhard concerning type designs to pertain to matter "not subject matter of copyright." (SD-71; App. 255).

On August 1, 1941 Register Bouve advised the Lanston Monotype Machine Company, in response to its inquiry accompanied by specimens of typeface designs, that "the work submitted, consisting of specially formed letters of the alphabet, script, et cetera is not believed to come within the scope of the Copyright Act". (SD-73; App. 269).

On July 17, 1942 Register Bouve advised one John Bibbs that, "the copyright law contains no provision under which it is possible to secure exclusive rights to a design for a new style of printers type." (SD-77; App. 282).

In reviewing these actions in our brief below, we noted that certain registrations were made for books whose titles were descriptive of certain typeface designs. However, the correspondence, etc., show that these registrations were made where the deposit copy contained sufficient literary expression in the form of text as, for example, might descriptively accompany a sample brochure or the like. The Office consistently and emphatically denied copyright could subsist in the design of type. Defendant's Brief before the District Court, pp. 10-11.

The record clearly reflects the regular Office policy of refusing claims to registration of typeface designs per se. The District Court examined the full record and agreed, holding that the practice of the Copyright Office in rejecting typeface designs "was exemplified in" these actions; Eltra's reference to the book registrations which were made "supports the [Copyright Office] position, not [Eltra's]." (Opinion, App. 59-60).

Eltra simply closes its eyes to the record and urges this court to draw contrary conclusions merely from the titles of the registered books. The record speaks for itself. This court might well ignore the contentions of both parties and make its own examination of the record (App., pp. 195-283). We respectfully submit that it will agree with the District Court that "an examination of the record refutes [Eltra's] contention" that "there is no such 'long-standing practice'" of refusing typeface registration. (Opinion, App. 59).

Eltra also asserts that the Copyright Office has registered claims in "typeface designs" for Alphatype Corporation. However, the record of these registrations demonstrates the error of this claim.* The Alphatype registrations pertain to a number of technical drawings in Class "I" containing symbols and numbers which convey technical information. (See SD-30; the reproductions in the Appendix prepared by Eltra

fail to show the symbols in many cases and the court's attention is respectfully directed to the certified photocopies in the record.)

As disclosed in Alphatype's counsel's letter to the Copyright Office of August 15, 1975 (SD-89; App. 286-287) and the Office's letter of November 5, 1975 (SD-90; App. 288), the basis for the registrations is the technical information conveyed by these symbols and not the drawings of the letterforms themselves.

As indicated in that correspondence, this is further confirmed by the treatment of the works as "unpublished" ("line 6" of the certificates in SD-29, App. 156-173, pertains to the "date of publication") because the symbols and information conveyed thereby are not represented in the type fonts

* Eltra apparently feels that characterizing the correspondence as "unpublished" detracts from its effect. This is baseless. Eltra well knows that the records of a completed registration are open to public inspection, and that the records of a rejected claim may be inspected for litigation or other good cause. 37 C.F.R. 201.2(c)(1) and (2). Eltra's assertion that the rejections were "possibly" based upon a pre-emption doctrine is equally baseless speculation. Indeed, Register Bouve's thorough letter on the issue stated that typeface designs are "not copyrightable as such . . . quite aside from the fact that it is the Patent Office which is vested with jurisdiction to protect designs for a font of type" (SD-70; App. 238); and in Mazer v. Stein the Copyright Office urged upon the Supreme Court the conclusion that pre-emption was not a valid basis for refusing copyright to a work which might be eligible for both copyright and design patent. See SD-33.

** Registration classes are based on 17 U.S.C., § 5. Section 5(i) identifies "drawings or plastic works of a scientific or technical character."

themselves as they are distributed. That the information forming the basis of the Alphatype registrations is symbolically expressed does not detract from copyrightability. Korzybski v. Underwood & Underwood, 36 F. 2d 727 (2d Cir. 1929); Harcourt, Brace & World, Inc. v. Graphic Controls Corp., 329 F. Supp. 517 S.D.N.Y. 1971). Eltra's emphasis on the absence of a "limitation" or "disclaimer" is meaningless. The registrations were made for "technical drawings" in Class I -- the registrations are limited on their face. A typeface design is not a technical drawing. The correspondence confirms the subject matter of the registrations as not including the typeface designs. Cf. Scoa Industries, Inc. v. Famolare, Inc., 192 U.S.P.Q. 216, 218 (S.D.N.Y. 1976) (Copyright Office correspondence "made clear" the subject matter of the registration.). SD-31, referred to at p. 17, fn. 8 of Eltra's brief was written in connection with a great many different Alphatype claims (App., 189). Alphatype's own view of its Class I registrations is confirmed in its later letter (SD-89; App. 286-87). The validity of the Alphatype registrations is not at issue here. The Copyright Office's position makes clear that it did not register claims to Alphatype's typeface designs. The District Court agreed. (Opinion, App. 59-60.) Again, the record speaks for itself and Eltra's continued insistence that the Alphatype registrations pertained to typeface designs shows only its desperation.

The Class A "Book" registrations relied on by Eltra

as Exhibits B1 through B3, newly introduced in its appellate brief, similarly demonstrate nothing but that registrations were made for books or pamphlets whose titles indicate they had something to do with typeface -- just as does this brief. There is nothing whatsoever to indicate that these registrations were for the design of a typeface. Eltra's reliance on its Exhibits B2 and B3 is astounding. These book registrations were secured by Merganthaler Linotype Co., apparently a predecessor of the Merganthaler Linotype division of Eltra (see, Sauer Aff., App. 36) and a long established and important force in typeface design and marketing. Eltra/Merganthaler's desperate attempt to rely on these registrations is most significant: it shows that throughout Appellant's long history in typeface design it has failed to secure a single copyright registration for a typeface design. This need not be left to implication. During the 1975 hearings in Congress, the following exchange occurred between Mr. Kastenmeier, Chairman of the House Copyright Subcommittee, and Henry Leeds, Esq., counsel to Eltra in the hearings and in this action:

MR. KASTENMEIER: Have you successfully obtained protection under any present law for typeface?

MR. LEEDS: No, we have not.

MR. KASTENMEIER: OK

Hearings on H.R. 2223 before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee

on the Judiciary, House of Reps., 94th Cong., 1st Sess. (1975) at 1030 (SD-83).

Eltra also relies on references to "typography", in one case, and "letter and numerical forms", in another, in the "new matter" lines (required of new or revised editions of previously published works) of the book applications represented in its newly introduced Exhibits B-4 and B-5. These applications were registrable on the basis of other allegations of new matter, namely, "illustrations" (B-4) and "introduction", "translation" and compilation" (B-5). In the case of Eltra's B-5, the Copyright Office had in fact suggested a more limited new matter statement. See Exhibit X to this brief. Perhaps because of a hesitancy to withhold registration where other elements of the claim were already registrable or where correspondence had already taken place, or perhaps because of simple oversight or error*, the Examiner did not insist upon deletion of the one element of an otherwise acceptable new matter statement. With respect to Eltra's Exhibit B-4, absence of a deletion of one element of an otherwise acceptable claim may have been due to the amorphous nature of the term "typography", a broad term not necessarily equated with typeface design. Compare Exhibit Y to this brief where, in correspondence with the same or a related applicant**,

* The Copyright Office registers more than 400,000 claims per year. It has no pretensions as to total freedom from occasional examiner error.

** The registrant in Eltra's B-4 is "The George Macy Companies, Inc.," of 595 Madison Avenue, N.Y.C. Correspondence in our Exhibit X was addressed to "Mr. George Macy" at the above address.

the Copyright Office required deletion of a reference to "typegraphic design" from a new matter line" . . . inasmuch as the 'typographic design' is not subject matter of copyright."

In sum, these new exhibits show only that the Office had not adamantly required deletion of references to uncopyrightable elements from the new matter lines of two book registrations where other clear grounds did exist for registration. These isolated and minor cases do not contradict the regular policy of the Copyright Office in refusing registration of typeface designs. (While the Copyright Office is aware of restrictions on expanded records on appeal under Rule 10a, Fed. R. App. Proc., we have been forced to submit Exhibits X and Y because Eltra's newly introduced exhibits do not give an accurate picture. We respectfully ask this court to take notice of both parties' new exhibits as public documents, or, in the alternative, that it disregard both Eltra's B - 1 through B - 5 and our X and Y.)

Contrary to Eltra's assertions that the Copyright Office has abandoned its practice in recent years, the Copyright Office did not introduce specific cases regarding its practices after 1956 because its Regulation, 37 C.F.R. §202.1(a), prohibiting registration of "mere variations of typographic ornamentation [or] lettering " establishes its

policy.* This Regulation itself has existed for twenty years. As in the rejection of applicant's claim, the Regulation is applied by the Office to prohibit registration for typeface designs as a category. Opinion, App. 59. See also, Deposition testimony of Richard E. Glasgow, pp. 9, 12, 18 and 25; Announcement Registration Original Typeface Designs - Copr. Off. Ann. ML-111. SD-88).

In sum, Eltra cannot dispute that, for almost seventy years and from the inception of its administration of the current Copyright Act, the Copyright Office has considered typeface designs to fall outside the ambit of the copyright law. Not once during the earlier hearings on the design bills referred to above, nor during the 1974 "Typeface Hearings" in the Copyright Office in which Eltra participated, nor during the 1975 hearings on typeface protection before a subcommittee of the House of Representatives in which Eltra participated (SD-83) did Eltra or anyone else either favoring or opposing typeface protection demonstrate (or even suggest) that this was not the case. The very premise of these various hearings was the Office's rejection practice; if the historical policy of the Office had been otherwise, it would surely have surfaced during these most detailed discussions and submissions by

*For an example of a post-1956 typeface registration of which Eltra is well-aware, see Hearings on H.R. 2223 before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Comm. on the Judiciary, House of Rep., 94th Cong., 1st Sess. (1975) at 1166-67 (SD-83).

the numerous parties directly affected by and long involved with typeface design.

Since there is no doubt about the long-standing practice of the Copyright Office, Eltra's citations of Spalding v. Antonious, 191 U.S.P.Q. 593 (4th Cir. 1976) and Heyman v. Commerce and Industry Ins. Co., 524 F. 2d 1317, 1320 (2d Cir. 1975) are misplaced. (In any event, these cases only stand for the familiar proposition that summary judgment cannot be awarded if there is a dispute between the parties as to a material fact.) Eltra's other citations are equally unavailing. Mitchell v. Commissioner, 300 F. 2d 533, 537, 538 (4th Cir. 1962) acknowledges the settled rule that "[c]onsistent, long-standing interpretive rules reflect the judgment of the agency empowered to administer the statute, and afford attorneys and the public a reliable basis for planning. For these reasons they should not be lightly disturbed." 300 F. 2d at 537. In Mitchell the court found a conflict between the administrative interpretation and the intent of Congress and found no evidence that the particular interpretation was called to the attention of subsequent congresses. The typeface practice of the Copyright Office accurately reflects the intent of Congress and was clearly made known to it. In Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973) the Court found there were "clear indications" that the administrative interpretation was inconsistent with the intent of Congress; here the clear

indications are that the administrative interpretation and the intent of Congress coincide.

Similarly, the comment in Espinoza v. Farah Manufacturing Co., Inc., 414 U.S. 86, 94-95 (1973) that "[c]ourts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong,'" has no applicability here since the "compelling indications" of the history of the copyright acts and designs proposals are that the administrative construction is the correct one.

POINT II - THE DISTRICT COURT'S COMMENTS CONCERNING "WORK OF ART" ARE NOT CONTROLLING AND MUST BE CONSIDERED AS IRRELEVANT, DICTA, OR ERROR

As discussed in Point I, the determination of whether Eltra's typeface design is copyrightable subject matter and a "work of art" within the meaning of the Copyright Act requires consideration of the relevant legislative and administrative history. E.g., Stein v. Mazer, 204 F. 2d 472, 477 (4th Cir. 1953), affirmed, Mazer v. Stein, 347 U.S. 201, 213-214 (1954); Norwegian Nitrogen Products Co. v. U.S., 288 U.S. 294, 317 (1933). See generally, pp. 4-5 & 27-28 above. The District Court properly considered these elements. It concluded that:

. . . the 'long standing' practice by the Copyright Office, acquiesced in by Congress, of denying registration to typeface designs, is, however, a formidable hurdle for plaintiff to clear." (Opinion, App. 59)

and most significantly:

. . . the legislative history here is very relevant and is not just inaction, but actual acquiescence in the administrative interpretation given the Copyright Act. That interpretation is long standing and is itself entitled to "great weight" in determining the meaning of a statute. [citing the Mazer case]. [First emphasis is in original; second added]. (Opinion, App. 60).

The court then dismissed the complaint.

It is readily apparent that the District Court's holding was that Eltra's typeface design is not entitled to registration; and that the very basis of this holding was that the work was not copyrightable within, in its words, "the meaning of a statute"

-- i.e., the Copyright Act. Accordingly, its earlier remarks that the Eltra design "is a work of art" (and its consequent reference to Copyright Office error) must be considered to be a subjective, general use of "art" which is immaterial to this case (p. 4 , above), dicta, or error. In any event, it is not binding upon this court.

Additionally, the District Court based its reference to "work of art" on "the admitted and uncontested facts of this case". Opinion, App., at 57. Whether typeface design, categorically, is a "work of art" is, however, a matter of law requiring statutory interpretation. It would appear that the "facts of this case" upon which the court relied were Eltra's assertions concerning the employment of skill by the designer, the amount of time expended, and the expense of producing and marketing the design. However, these "facts" cannot make a typeface design a "work of art" under the Copyright Act. E.g., L. Batlin & Son, Inc. v. Snyder, 187 U.S.P.Q. 721, 730 (2d. Cir. 1975) (Oakes, J., dissenting), reversed en banc, 536 F. 2d 486, 488 (2d. Cir. 1976) (Oakes, J.) (copyright not demonstrated by "physical skill"; "special skills; or "special skill, training and knowledge, and independent judgment"). The point has been well made by Irwin Karp, Esq., Counsel for the Author's League of America;

It is argued that the design of publishing type faces requires skill and an investment of money, hence it is entitled to copyright protection. But many other contributions to literature, art, scholarship and the film, to cite a few of the media, also require skill, talent, the risk of funds, and are not copyrightable. The crafting of quality paper and ink for example is also a

labor involving these elements, yet these other tools for publishing copyrighted books are not in themselves copyrightable.

The most valuable contributions made by the greatest writers are the ideas they introduce for the first time in their works. Yet ideas are not copyrightable, no matter how much talent, indeed genius, was required to produce them. The facts uncovered by skill, painstaking research, often at considerable expense, cannot be protected from use by others under the Copyright Act. They are not copyrightable.

The copyrighted films of D.W. Griffith and other great innovators presented to the public and other film makers techniques of the greatest artistic and commercial value. The close up, the montage, the cut and the dissolve, each was a brilliant, innovative, film technique. These were great artistic conceptions recorded on film, not ephemeral. Yet each new film technique was the product of skill, imagination and creative effort of the highest order. None is copyrightable. There are many other examples. Joyce created a new technique for communicating literary experience and expression, the stream of consciousness. It is not protected by his copyright on Ulysses. Sherwood Anderson or Gertrude Stein or Ernest Hemingway, depending on your choice of critics, brought a revolution in the writing of dialogue. Despite the talent which was required to reshape literary technique, none of them could use the copyrights on their works to prevent other authors from copying detail for detail these techniques. (Defendant's Brief before the District Court, pp. 25-26.)

See also, e.g., Jack Adelman, Inc. v. Sonners & Gordon, Inc., 112 F. Supp. 187 (S.D.N.Y. 1934) (dress designs not copyrightable "works of art").

POINT III - COPYRIGHT PROTECTION FOR TYPEFACE DESIGNS IS
"PREEMINENTLY A PROBLEM FOR CONGRESS".

In the famous Williams & Wilkins copyright case involving library photocopying, the Court of Claims said:

The truth is that this is now preeminently a problem for Congress: to decide the extent photocopying should be allowed, the questions of a compulsory license and the payments (if any) to the copyright owners, the system for collecting those payments (lump-sum, clearinghouse, etc.), the special status (if any) of scientific and educational needs. Obviously there is much to be said on all sides. The choices involve economic, social, and policy factors which are far better sifted by a legislature. The possible intermediate solutions are also of the pragmatic kind legislatures, not courts can and should fashion. . . . Intermediate or compromise solutions are not within our authority [Williams & Wilkins Co. v. U.S., 487 F. 2d 1345, 1360 (Ct. Claims 1973), aff'd. by an equally divided court, 420 U.S. 376 (1975)]

See also, e.g., Fortnightly Corp. v. United Artists, 392 U.S. 390, 401-02 (1968) (Congress, not the courts, must balance "competing considerations of copyright, communications and antitrust policy" in the case of copyright liability of community antenna television systems.) The principle of these cases is particularly appropriate to the issue of copyright and typeface design.

Typeface designs like Eltra's ORION are unique. They are used to produce in printed form the text of books, newspapers, other periodicals, and printed literary works. They are the very vehicle by which the printed word is communicated in visible

form.* During Congressional consideration of copyright protection for typeface designs, publishers have repeatedly expressed grave concern over the possibility of monetary and, particularly, injunctive relief being imposed for their publication of materials set in an infringing typeface. This liability would follow, under ordinary copyright principles, whether the publisher acted knowingly or unwillingly, and whether the publisher selected the typeface used or (as in the case of journal publishers who commonly use advertisements prepared on proof by advertising agencies) did not. See, e.g., Defendant's Brief before the District Court at 22-23 (concerns expressed by publishers [1975 Hearings, SD- 83 at 1220]; reprint publishers [Letter from Greenwood Press, SD-92]; and Government Printing Office [Letter from T.F. McCormick, Public Printer, SD-93]). These concerns have been known to Congress since at least as early as 1916. E.g., Hearings before the Committee on Patents, House of Representatives [on H.R. 6458 and H.R. 13618], 64th Cong., 1st Sess. (1916) at 277 (News-Press of St. Joseph, Mo.: "I fear that [if] this legislation . . . were passed, publishers would be ex-

* For this reason, it is immaterial that typeface designs were joined with other designs in the bills referred to earlier, and that certain such other designs might be copyrightable under contemporary standards. No across-the-board conclusions can be drawn. For example, jewelry contemplated by the design bills may be registrable under the specific language of 37 C.F.R. 202.10(a), but furniture, stoves, automobile designs, dress designs, contemplated by many of the bills are not. See, e.g., Jack Adelman, Inc. v. Sonnors & Gordon, Inc., 112 F. Supp. 187 (S.D.N.Y. 1934) Scoa Industries Inc. v. Famolare Inc., 192 U.S.P.Q. 216 (S.D.N.Y. 1976).

posed to injury through their innocent use of typefaces which had been copyrighted. As you are probably aware, a large portion of the advertising in this country is done through the medium of electrotypes or stereotype plates, which are reproductions of type masters and illustrations 'set up' at one point and distributed through these reproductions to many newspapers."); Hearing before a Subcommittee of the Committee on Patents, United States Senate, 64th Cong., 2d Sess. (1917) at 15 (Courier Journal Company: "The provisions of this bill are so sweeping as to render us liable as publishers for violations which are entirely beyond our power to determine."); and at 73 (Thompson Type Machine Co.: "It is inconceivable that Congress will legislate at this late day that typefaces may become proper subjects of copyright In perhaps no other industry would an injunction proceeding for alleged violation of copyright be so disastrous as to the newspaper publisher.") These concerns were repeated to Congress in the 1975 hearings. E.g., Hearings on H.R. 2223 . . . (1975) at 1215-1221 (SD-83).

During the latter stages of the revision program culminating in the Copyright Act of 1976, the possibility arose of Congress and the proponents and opponents of typeface protection agreeing upon a special provision limiting suits for infringement of typeface designs to manufacturers of pirated

fonts, and excluding liability of publishers. See Hearings on H.R. 2223 . . . (1975) at 1042 (SD-83) and 1861 (SD-84). However, as noted earlier, Congress chose instead to defer the question of typeface protection for further consideration.

Similarly, opponents of protection for typeface on copyright principles have raised serious issues regarding the economic and competitive consequences to the typography industry. See Hearings on H.R. 2223 . . . (1975) at 1142-53, 1212-15 (SD-83); see also, Brief Amicus Curiae of International Typographic Composition Assn. and Advertising Typographers Assn. of America, Inc. pp. 2-3. Again, these issues have been made known to Congress since at least as early as 1917. See Hearings before a Subcommittee of the Committee on Patents, United States Senate, 64th Cong., 2d Sess. (1917) at 68-74. As with the question of liability, the possibility arose during the latest typeface design copyright efforts of a compulsory licensing system to meet these issues. See Hearings on H.R. 2223 . . . (1975) at 1042 (SD-83) and 1861, 63 (SD-84); but again, Congress has not yet acted.

The Copyright Office does not purport to sit as a legislator (or judge) of these issues. We maintain only that the issues surrounding copyright protection for typeface involve complex and fundamental policy matters, and possible need for special solutions, identified in Williams & Wilkins and Fortnightly as "preeminently a problem for Congress."

Congress has, for now, clearly expressed its intent not to protect typeface designs on copyright principles. We respectfully submit these factors emphasize that the court should not grant protection that has heretofore not existed. (Contrary to the District Court's suggestion [App. 58-59] we do not maintain that the First Amendment precludes the possibility of copyright protection for typefaces. To the contrary, the Office has supported such protection under appropriate legislation. See Hearings on H.R. 2223 . . . (1975) at 1860-63 (SD-84.)

POINT IV - AS ELTRA'S TYPEFACE DESIGN IS NOT SUBJECT MATTER OF COPYRIGHT, THE SCOPE OF THE COPYRIGHT OFFICE'S AUTHORITY NEED NOT BE REACHED BY THE COURT. IN ANY EVENT, THE OFFICE PROPERLY EXERCISED ITS AUTHORITY IN REFUSING REGISTRATION OF THE UNCOPYRIGHTABLE WORK.

A. The Authority Issue.

Eltra has introduced issues concerning the authority of the Register and the constitutionality of the Copyright Act of 1909 in an attempt to buttress an otherwise indefensible position -- that after 68 years, the courts should extend copyright protection to typeface designs. If typeface designs are not subject to copyright under the Act of 1909, as we have argued under Point I, the court need not reach the question of the Register's authority. The dismissal must be affirmed as registration could not be ordered. This is true even if one assumes arguendo that the Register has no authority to reject an uncopyrightable work. United States, ex rel. Everson v. Young, Librarian of Congress, 26 Wash. L. Rep. 546 (D.C. Sup. Ct. 1898).

This principle is particularly significant because registration is treated as prima facie evidence of the validity of the copyright. E.g., Flick Reedy Corp. v. Hydro-Line Mfg. Co., 351 F.2d 546 (7th Cir. 1965). Under such circumstances it would be particularly inappropriate to compel registration or declare registrability of an uncopyrightable work. The authority of the Register of

Copyrights to refuse registration on the grounds that a work is not subject matter of copyright has been conclusively established. E.g., Brown Instrument Co. v. Warner, 161 F.2d 910 (D.C. Cir. 1947), cert. denied, 332 U.S. 801 (1947); Bailie v. Fisher, 258 F.2d 428 (D.C. Cir. 1958). This court should properly review the Register's determination but should not order registration if it also concludes the work is not copyrightable. Ibid.

In sum, whether viewed as a matter of a limitation of remedies or as a matter of the Register's authority, this case begins and should end with the court's determination as to whether Eltra's typeface design is copyrightable subject matter. This court should not lend the prima facie effect of the statute or the dignity and practical effect of its judgment to an uncopyrightable work. If the Copyright Office and District Court were correct in concluding that typeface designs are excluded, the dismissal of the action should be affirmed as the relief requested in Eltra's complaint cannot be granted.

B. The Copyright Office Properly
Exercised Its Authority

Eltra's assertion that the Copyright Office exceeded its authority in this case is unsupportable in any event. As indicated above, the authority of the Copyright Office to refuse registration of claims to copyright

in uncopyrightable works is well established. Thus, in Brown Instrument Co. v. Warner, 161 F.2d 910 (D.C. Cir. 1947), cert. denied, 332 U.S. 801 (1947), an action brought against the Register for declaratory and mandatory injunctive relief to compel registration of a graphic chart used with certain machinery, the court concluded that "Plaintiff has failed to establish that its charts are 'writings of an author' or 'drawings' within the meaning of the Constitution and the copyright act" and granted judgment for the Register. Similarly, in Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) the Register refused registration of a device on the grounds it was not subject matter of copyright. In an action seeking an order of registration and related declaratory relief, the court granted summary judgment for the Register, stating (258 F.2d at 426):

The appellee, Register of Copyrights, refused registration on the ground that the device is not a work of art and is not subject matter for copyright * * *.

"* * * [T]he Register may properly refuse to accept for deposit and registration 'objects not entitled to protection under the law.' * * * It seems obvious, also, that the Act establishes a wide range of selection within which discretion must be exercised by the Register in determining what he has

no power to accept. * * *" Bouve v. Twentieth Century-Fox Film Corp., 1941, 74 App. D.C. 271, 273, 122, F.2d 51, 53. The Register's discretion is not uncontrolled, but is subject to judicial review and correction. Ibid.

See also Vacheron & Constantin Le Coultre Watches, Inc. v. Benrus Watch Co., 155 F. Supp. 932, 934 (S.D.N.Y. 1957) ("Register of Copyrights acted properly in refusing registration" of a jeweled watchface as a work of art.); Hoffenberg v. Kaminstein, 396 F.2d 684 (D.C. Cir.), cert. denied, 393 U.S. 913 (1968); 28 Ops. Atty. Gen. 557, 561 (1911); 30 Ops. Atty. Gen. 422, 424-425 (1915); 41 Ops. Atty. Gen. 395 (1958); 43 Ops. Atty. Gen. No. 2, 183 U.S.P.Q. 624, 628 (1974).

At pages 27-28 of its brief, Eltra relies on the companion actions brought against Register Bouve in 1940. These cases did not involve the copyrightability of the subject matter involved, but rather whether a collection of page proofs was entitled to registration as a single published book as contended by the plaintiffs, or whether separate registration had to be made for each "proof" as subsequently published in various newspapers, as contended by the Register. There was no question as to the copyrightability of the material, and the courts held the Register could not refuse registration for a claim comprising copyrightable subject matter. Moreover, the

opinions in these cases support the Copyright Office position in this action, not Eltra's. Thus, at page 27 of its Brief, Plaintiff quotes a sentence from the lower court opinion in Twentieth Century-Fox Film Corp. v. Bouve; it omits, however, the full paragraph from which the sentence was taken:

As to the discretionary power of the Register of Copyrights. I think that he has no power to refuse to register any copyright that is entitled to registration under the law; that it is a question of fact whether the applicant has complied with the law; that if he has complied with the law he is entitled to have the copyright registered; that any finding of fact or conclusion of law on the part of the Register of Copyrights are not binding upon the court. I think that the powers of the Register of Copyright are analogous to the powers of the Postmaster General in admitting articles in the mail and of the Register of Deeds in recording instruments. Payne v. United States ex rel. National Railway Publishing Company, 20 App. D.C. 581; Dancy v. Clark, 24 App. D.C. 487. [33 F. Supp. 463; emphasis added]*

* It is appropriate to consider the Register of Deeds case cited in the lower court opinion. In Dancy v. Clark, 24 App. D.C. 487 (1904) the court refused to mandamus a register of deeds to accept a corporate charter invalid on its face. The Court said: "Undoubtedly the recorder of deeds is in the category of ministerial officers, and has no jurisdiction to pass upon the validity of instruments of writing presented to him for record. . . . But [footnote continued on next page]

Additionally, Eltra ignores the holding of the Court of Appeals affirming the decision below:

Even amicus curiae concedes that the Register may properly refuse to accept for deposit and registration "objects not entitled to protection under the law."

* * * *

It seems that the Act establishes a wide range of selection within which discretion must be exercised by the Register in determining what he has no power to accept. This formula which he must apply is a more difficult one than that of the Recorder of Deeds, upon which appellee relies by way of analogy. Nor would there seem to be any doubt that the Register may refuse to issue a certificate of registration until the required fee is paid, and until other formal requisites of the Act have been satisfied.

[footnote cont'd]

he is not for this reason wholly without discretion to determine whether any instrument of writing should be admitted to record. He is by the law required to receive and file, or receive and record, as the case may be, such instruments as have been duly executed, and which purport on their face to be of the nature of the instruments entitled to be filed or recorded. Assuredly, supposing some extreme cases, in order to illustrate what we desire to say, if a promissory note, or a deed of conveyance of land, or a chattel mortgage, were offered to him to be filed as a certificate of incorporation, he would certainly be warranted in a refusal to receive it. Nor would he be warranted in receiving and filing or recording an instrument of writing purporting to have been acknowledged before some person not entitled to take acknowledgements, much less would he be warranted in receiving for recording a paper that was not acknowledged at all. He has the right to exercise discretion in the premises, but not judicial discretion. The courts will sustain him when he acts within the limits of the discretion reposed in him; they will coerce his action when he has exceeded those limits and denied a right to which parties are by law entitled."

It does not follow however, that he has power to exercise uncontrolled discretion in refusing registration of material which is subject to copyright, merely because he disagrees with the author as to how it should be classified. [122 F.2d at 53-54; emphasis in original; footnotes omitted]

and:

[A]ssuming that [the Register] has full power to classify deposited material, still this gives him no power to refuse registration of a claim of copyright, which has already been secured by publication and notice; if the claim is based upon material which is actually the subject of copyright. [122 F.2d at 54-55; emphasis added]

Full consideration of the relevant District Court's language in the companion King Features case, quoted in part at p. 28 of Eltra's brief and implicitly subject to the Court of Appeals decision in the Twentieth Century-Fox Films case, is also warranted:

The defendant, as Register of Copyrights, has no power to refuse or deny registration of a claim to copyright which is entitled to registration under the Copyright Act. Whether an applicant or claimant has complied with the law so that his claim is entitled to be registered raises questions of fact and law to be decided by the court; the Register of Copyrights has no power to decide such questions, especially where the deposit of copies and the application filed, when read together as they should be are in apparent compliance with the Act. In any event findings of fact and conclusions of law made by the Register of

Copyrights may be reviewed by the court, and they are neither conclusive nor binding upon the court, and such findings and conclusions, if erroneous, may be rectified by this court. [48 USPQ at 242 emphasis added]

In sum, although the Bouve decisions held that the Register's refusals involved were in error, the courts did not deny -- and in fact confirmed -- the authority of the Register to refuse registration for uncopyrightable works.

Eltra contends that Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) and Hoffenberg v. Kaminstein, 396 F.2d 684 (D.C. Cir.), cert. denied, 393 U.S. 913 (1968), which recognized the authority of the Register in unambiguous rulings, are "weakened" by a failure to comment on and examine the legislative history of the Copyright Act of 1909. [Appellant's Brief at 27]. This reading of the opinions stems from Eltra's own confusion about "legislative history," as shown by its characterization of informal Copyright Office/industry consultation panels of 1905-06 as part of the "hearings on the 1909 Act." [Appellant's Brief, note 18, at page 24].

Many of the isolated statements relied upon by Eltra, selected from over 1500 pages of transcription of the panel meetings, are the personal comments of private practitioners, many of whom preferred to restrict the authority of the Copyright Office for their own practical

reasons. As stated by Librarian Putnam in introducing the draft of the revision bill culminating in the 1909 Act to Congress:

We would have no misunderstanding as to what this bill is. It is a bill resulting from the conference, but it is not a conference bill; for the conference did not draw it, nor did it by explicit vote or otherwise determine its precise provisions. It is rather a copyright office bill. (Goldman, The History of U.S. Copyright Revision From 1901 to 1954, SD-78 at 2).

Moreover, the Bailie and Hoffenberg cases were fully briefed and argued by counsel. The authority of the Register was expressly challenged in both and in Hoffenberg the entire legislative history (i.e., committee hearings, committee reports, and debates in Congress) were thoroughly examined by the parties and argued to the court. Both cases concluded that the Copyright Act confers on the Register the discretion to determine, in the first instance and subject to judicial review, whether the subject matter and formal requisites of the Act have been satisfied.

Eltra also relies on the statement in the 1909 House Report that the provision enabling the Register to issue rules and regulations does not confer upon the Register any "judicial functions." The Copyright Office

does not exercise "judicial functions" -- it does not investigate the credibility of statements made in the application, resolve conflicting claims among multiple claimants or determine issues of infringement. It does refuse registration of subject matter clearly outside the provisions of the Act; such refusals are subject to full review by the courts.

Eltra ignores the fact that the very first regulations issued by Register Solberg and Librarian Putnam under the 1909 Act demonstrate the clear understanding that the Copyright Office would determine whether the subject matter of an application was within the province of copyright. Thus, the first regulations in 1910 prohibited copyright in blank books, legal forms, and other matter, including ornamental letters or forms of type. SD-8, App. 122-23.

Eltra's reference to the exchange between Register Solberg and Representative Currier three years after enactment of the 1909 law [SD-18, App. 136-138] ignores Register Solberg's testimony that the Copyright Office did refuse to register "a great many things." App. 138.

Additionally, contrary to Eltra's assertions, Representative Currier made no statement at all about the advisability of the Copyright Office having a body of examiners. He remarked that it did not then have examiners, which was true, and his concerns were in fact predicated on the absence of an examining staff, a lack subsequently cured by the establishment of an examining staff more than thirty years ago.

Eltra ignores bills subsequently introduced in Congress which, inter alia, expressly provided that: "[T]he Copyright Office shall have no discretion to refuse to receive such application or to refuse to register such work upon such application being made." E.g., H.R. 6990, 71st Cong., 2d Sess. (1929) §36. In 1930 the Assistant Register of Copyrights strongly objected to this provision and to the elimination of the Office's existing right to refuse registration of "things which are not subject to Copyright," and Representative Lanham responded: "I assume that there is no intention to deprive you of that right." Hearings before the House Committee on Patents on H.R. 6990, 71st Cong., 2d Sess., Part I (1930) at 180-181.

Eltra's argument is based on its categorization of the Register's rejection of "ORION" as involving "the exercise of a highly discretionary, judicial or executive, as opposed to a ministerial, function. This is an arbitrary exercise of power beyond the scope of the Register's authority." [Appellant's Brief at 28].

We urge the court to disregard the labels used by Eltra and examine precisely the nature of the authority exercised in this case:

- In 1956 the Librarian of Congress approved the issuance of exclusionary regulations, codifying initially contemporaneous and long-standing practices of the Copyright Office acquiesced in by Congress
- On December 19, 1975, the Chief of the Examining Division of the Copyright Office rejected Eltra's application by direct application of the exclusionary regulations

To the extent that the Register herself can be said to have exercised authority in this case, it consists of her refraining from recommending a change in the regulations to permit registration of typeface designs. However, considering the administrative and legislative history of this matter the Register could not have done otherwise. The courts have made it abundantly clear that they will not permit administrators to abandon long standing, contemporaneous practice

in the absence of controlling judicial* or legislative direction. United States v. Leslie Salt Co., 350 U.S. 383, 396-97 (1956). See also, e.g., Power Brake Equipment Company v. U.S., 427 F.2d 163 (9th Cir. 1970).

Under the circumstances, the rejection of Eltra's application was entirely proper and necessary as a matter of both the application of the Copyright Act and "proper regard for the respective functions of legislature and administration" [Griswold, "A Summary of the Regulations Problem." 54 Harv. L. Rev. 398, 416 (1941)].

* No case has suggested that typeface designs are copyrightable subject matter. See Defendant's Brief before the District Court, p. 22 fn. Those cases which have at least taken cognizance of 37 C.F.R. 202.1(a) have approved it. Kitchens of Sara Lee, Inc. v. Nifty Foods Corporation, 266 F.2d 541, 544 (2d Cir. 1959); Alberto-Culver Company v. Andrea Dumon, Inc., 466 F.2d 710 (7th Cir. 1972). Professor Nimmer's statement in his text (Appellant's brief p. 9 fn.) appears to relate to "typography," i.e., the layout of a printed page, rather than typeface design. SD-24 (App. 146) was a submission made to the Copyright Office "on behalf of" Eltra's Mergenthaler division. Neither source adds anything to Eltra's arguments, or considers the administrative and legislative history.

As Eltra's arguments under the Appointments Clause of the Constitution and Separation of Powers Doctrine are based on the Defendant's alleged exercise of "broad administrative and executive powers," they are, as recognized by the District Court, negated simply by consideration of the very limited authority actually exercised in this case. Also, Eltra's arguments are not supported by the authority cited.

In Buckley v. Valeo, 424 U.S. 1 (1976) the Supreme Court held that officials exercising legal authority of the significance of the Federal Election Commission must be appointed pursuant to Article II, sec. 2, clause 2 of the Constitution. The essential authority exercised in this case was the promulgation of the regulations under which Plaintiff's claims were rejected. The rejection was necessarily mandated by the very terms of the Regulations, and no "broad" discretion was exercised by the Chief of the Examining Division in rejecting the claim. As the Regulations themselves were approved by the Librarian of Congress, and could not take effect without his approval (17 U.S.C. §207), and as the Librarian is appointed by the President with the advice and consent of the Senate in conformity with the Appointments Clause, the Buckley prescription is fulfilled.

Even if the Register of Copyrights could be somehow considered to have exercised significant authority in this case*, her appointment by the Librarian of Congress (17 U.S.C. §202) is consistent with the Appointments Clause since the Librarian is the "Head of a Department" under the Constitution. In the Buckley case the Supreme Court said: "the Departments referred to are themselves [those that are] in the Executive Branch or at least have some connection with that branch." (424 U.S. at 127; emphasis added.)

At page 33 of its brief, Eltra ignores this portion of the Buckley opinion and combines in one sentence, attributed by the introductory phrase entirely to Buckley v. Valeo, language from both Buckley and Burnap v. United States, 252 U.S. 512, 515 (1920).

By this, Eltra attempts to create an impression that the Supreme Court more recently than United States v. Germaine, 99 U.S. 508, 510 (1879) has given "Head of a Department" the restricted meaning urged by appellant. However, Burnap was not a constitutional case. The

* Of course, the Chief's action can be attributed to the Register, but again the rejection itself was the result of a direct application of the Regulations approved by the Librarian.

Court construed the term "head of a Department" in Section 169 of the Revised Statutes of 1920, stating specifically:

The term head of a Department means, in this connection, [i.e., Section 169 above] the Secretary in charge of a great division" 252 U.S. at 515.

The Court clearly did not construe the constitutional phrase and was concerned merely to make a statutory distinction between heads of departments and heads of bureaus or lesser divisions.

The Germaine case was decided four years before Congress created the first of the independent agencies [the Civil Service Commission, 22 Stat. 403 (1883)] and, as indicated in Buckley, its limited conception of a "Head of a Department" is no longer controlling. See also 37 Ops. Atty. Gen. 227 (1933). The Librarian of Congress has a most integral "connection" with the Executive Branch, namely, Presidential appointment; this "connection" clearly meets the Buckley standard. (See Defendant's District Court brief at 30-31 for a comparison of the limited authority exercised by the Copyright Office in general with the "extensive," "wide-ranging" authority at issue in Buckley.)

Eltra's reliance on the Separation of Powers Doctrine is equally misplaced. The Copyright Office, contrary to Plaintiff's assertions, does not exercise "executive powers" generally, and certainly has not done so in this case. The essential nature of "executive power" was described in Buckley, 424 U.S. at 138 as "the discretionary power to seek judicial relief."*

The authority exercised by the Copyright Office in this case consisted of refusing registration of a claim in subject matter not considered to fall within the scope of the Act (a refusal required, in fact, to avoid encroachment on legislative or judicial authority), thereby submitting itself to judicial review of the validity of its determination. This is no more "executive" power than that exercised by the Register of Deeds in Dancy v. Clark, see p. 52, fn., supra. The Copyright Office does not even exercise the considerable administrative powers of the independent regulatory

* Eltra's assertion that an "advisory opinion" was declared to be an "executive function" in Buckley [Appellant's brief at 31] is simply not correct. The administrative powers of the FEC were not considered "executive" for purposes of Separation of Powers, but were considered "significant authority" for the purposes of the Appointments Clause. 424 U.S. at 140-141.

agencies. Nor does it "enforce" the Copyright Act -- this is left to the Justice Department in criminal matters and private litigants in civil infringements.

It is conclusively settled that the Constitution does not require a pristine separation of powers [Buckley v. Valeo, 424 U.S. at 121-122] and that, subject to the requirements of the Appointments Clause (Buckley v. Valeo, supra) and the preservation of executive power within the executive branch, Congress may effectuate its ends by creating and locating offices at it sees fit. E.g., Humphrey's Executor v. United States, 295 U.S. 602 (1935).

For the first 80 years of the copyright law, Congress was shopping around for a home for the copyright registration system,* and finally found one in the Library of Congress. The deposits secured through the copyright registration system were of tremendous importance in the the growth of the national library, and remain a valuable source of the collections. Although, in theory, the registration system might be administered by one agency, with

* At one time or another, the copyright registration-deposit system was the responsibility of the clerks of the district courts, the Secretary of State, and the Department of the Interior. See Defendant's brief in the District Court at 31-33.

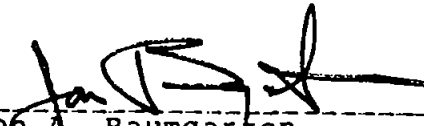
deposits forwarded to another, in fact, actual historical experience has demonstrated that such a system did not work.

The copyright registration procedure in the Library of Congress has functioned well for 106 years, unchallenged by anyone in the numerous copyright cases litigated. Copyright owners and the public have been well served. The courts have always been available to those claiming injury by actions of the Library or the Copyright Office. There is no reason, in the system of checks and balances or otherwise, to depart from this system.

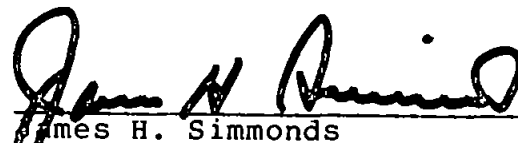
CONCLUSION

For the foregoing reasons, the Register of Copyrights respectfully requests that the decision of the District Court be affirmed.

Respectfully submitted,



Jon A. Baumgarten
General Counsel
United States Copyright Office
Library of Congress
Washington, D.C. 20559
(703) 557-8731



James H. Simmonds
15th Street & North Courthouse Rd.
Arlington, Virginia 22201
(703) 525-7700

Of Counsel:

Dorothy M. Schrader
Senior Attorney
United States Copyright Office
Library of Congress
Washington, D.C. 20559
(703) 557-0865

HE:tgj
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COPYRIGHT OFFICE
THE LIBRARY OF CONGRESS
WASHINGTON, D.C. 20540

OCT 11 1968

Mr. Edward Connery Lathem
Baker Library
Hanover, New Hampshire 03755

Re: STUDIES IN TYPE DESIGN,
published July 1, 1968

Dear Mr. Lathem:

Copyright registration for this work has not been completed because your application lacks a statement of new matter.

When a new work contains material that has been published or copyrighted previously, the copyright claim must be based on the copyrightable new matter appearing in it for the first time. In such cases, the application must contain a brief, general description of this new matter in the appropriate space. The statement of new matter is required whether the previous material is copyrighted or in the public domain, or whether you or someone else published or copyrighted the previous material. It is not enough simply to include information about the author of the new matter.

Copyrightable new matter may consist, for example, of new text added to the body of the work, new words, new music, new musical arrangement, a new preface or bibliography, or new pictorial, graphic, or cartographic material. It may also include compilation, translation, abridgment, dramatization, or editorial revisions.

The work you deposited appears to contain material that has been previously published or copyrighted. If this is so, you should add a statement of new matter to line ---- of your application, which we are returning for this purpose. Please make sure that line ---- also includes the name, citizenship, and domicile of the author of the new matter.

IMPORTANT: IN REPLY PLEASE REFER TO CASH NO. 22781 (L)
AND THE DATE OF THIS LETTER, OR RETURN THE
ENCLOSED CARBON COPY.

Sincerely yours,

REGISTER OF COPYRIGHTS *tyw*

P.S. "Additional text and compilation," if correct,
would suffice at line 5.

Enclosures:

c.c. this letter

Appl. (pp. 1 and 2) ret'd

Circular 1

THE LIBRARY OF CONGRESS
COPYRIGHT OFFICE
WASHINGTON, D. C.

JAN 30 1943

Mr. George Macy
595 Madison Ave.
New York, N. Y.

DEAR Sir:

Registration of your claim of copyright for the article indicated below cannot *yet* be made because the Office does not have all the information required under the copyright statute.

Application would best be filed on the enclosed form and if you will return it properly filled in (*both sides*), giving all the information asked for, prompt attention will be given thereto. Your remittance of \$2.00 for registration fee is held under No. 3655 to which please refer.

Respectfully,


Register of Copyrights.

ENCLOSURES:

Form A2
Circular

Application for registration of "THE ROSE AND THE RING" or "THE HISTORY OF PRINCE GIGLIO AND PRINCE BULBO", published Dec. 19, 1942, gives the statement of new matter in the space provided above line (1) as "1) Illustrations (2 A Dedication, 3) Typographic design". However, inasmuch as the "typographic design" is not subject matter of copyright, the new form A2, enclosed, should be filled out in full omitting this statement from the new matter.

EXHIBIT Y

(p.2)

The Limited Editions Club INC. 595 Madison Avenue, New York

Telephone PLAZA 8-2880



Cables LIMITBOOKS

February 4 1943

FEB -5 1943

Mr. C. L. Bouve
The Library of Congress
Copyright Office
Washington, D.C.

Re: Number 3655

Dear Mr. Bouve

Thank you for calling attention
to our error in registering our edition
of The Rose and the Ring, and for sending
us the new form A2. I attach this form,
properly filled out.

Cordially yours

C. J. Weiss

cjw.m

C. J. Weiss

*This appl. rec'd Feb. 5 attached to
original affidavit*

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Cleared for entry by Steagall FEB - 6 1943

In accordance with Rule 25 of the Rules of the U.S. Court of Appeals Fourth Circuit, I hereby certify that I have this 4TH day of April, 1977 filed the required copies of the Appellee's Brief in the Clerk's Office, and have mailed the required copies of the Appellee's Brief to Robert H. Johnson, Eltra Corporation, P. O. Box 931, Toldeo, Ohio 43694; E. Fulton Brylawski and J. Michael Cleary, 224 East Capitol Street, Washington, D. C. 20003; Henry W. Leeds, Mason, Fenwick & Lawrence, 1730 Rhode Island Avenue, N.W., Washington, D. C. 20036; and W. Gibson Harris and Anne Marie Whittemore, McGuire, Woods & Battle, 1400 Ross Building, Richmond, Virginia 23219.


JON A. BAUMGARTEN